85-1592

Supreme Court, U.S.
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No. .

In the Supreme Court of the United States

OCTOBER TERM, 1985

THOMAS BURKE, ET AL.,
PETITIONER,

v.

MASSACHUSETTS ASSOCIATION OF AFRO-AMERICAN POLICE, INC., ET AL.,
RESPONDENTS,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

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Questions Presented for Review

Whether the Court of Appeals for the First Circuit erred in holding that this Court's decision of *Firefighters' Local Union No. 1784 v. Stotts*, ____ U.S. ____, 104 S.Ct. 2576 (1984) was inapplicable to a consent decree entered into as a voluntary settlement of claims which includes affirmative action provisions, including promotional goals, designed to increase the number of black sergents in the Boston Police Department.

Whether the Court of Appeals erred in affirming the order of the District Court denying the petitioners' Motion to Intervene for the purpose of moving to vacate a consent decree entered in 1979 where the petitioners were third parties whose eligibility for promotion had been terminated by the consent decree; where the consent decree included an express disclaimer of any violations of Title VII; and where, prior to the filing of the petitioners' Motion to Intervene on July 25, 1984, the consent decree had effectively not been implemented.

Petitioners

Applicants for Intervention - Appellants below: Thomas Burke, Timothy P. Callahan, David Campbell, Keith Carlson, Edward Cavanaugh, Robert Childs, Marcy Corwin, Robert Cunningham, Lawrence Daly, Clifford Dawson, Walter Duggan, Robert Francis, Francis Gaughan, Joseph Griffin, John Jansky, Myles McGrail, David Mackin, Michael McWeeny, William O'Connell, John T. Pels, Eugene F. Simpson, Thomas Steiner, George Symes, John S. Tobin, Joseph Wells, Herbert White, Arthur W. Morgan, Jr., Patricia Rehm-Levitan, and James E. Nugent.

Respondents

Plaintiffs - Appellees below: Massachusetts Association of Afro-American Police, Inc., William Celester, and Roy Howard;

Defendants - Appelles below: Department of Personnel Administration for the Commonwealth of Massachusetts, Boston Police Department.

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No.

In the Supreme Court of the United States

OCTOBER TERM, 1985

THOMAS BURKE, ET AL.,
PETITIONER,

v.

MASSACHUSETTS ASSOCIATION OF
AFRO-AMERICAN POLICE, INC., ET AL.,
RESPONDENTS,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Petitioners Thomas Burke et al. (the "petitioners") respectfully petition this Court, pursuant to 28 U.S.C. § 1254(1) and Rule 19 of the Rules of this Court, for a writ of certiorari to the United States Court of Appeals for the First Circuit in the case of *Massachusetts Afro-American Police, Inc., et al.*, 780 F.2d 5 (1st Cir., 1985).

Opinions Below

The opinion of the Court of Appeals, entered December 20, 1985, is reported at 780 F.2d 5 (1st Cir., 1985) and is set forth in Appendix A. The judgment of the Court of Appeals affirming the order of the District Court is set forth at Appendix B. The Memorandum and Order of the District Court denying the petitioners' Motion to Intervene is set forth at Appendix C.

Jurisdiction

The judgment of the Court of Appeals affirming the order of the District Court was entered on December 20, 1985. This Court has jurisdiction to review the decision of the Court of Appeals pursuant to 28 U.S.C. § 1254 (1).

Statutory Provisions

The following statutes are involved in this petition: 42 U.S.C. § 2000e — 2(j) and 42 U.S.C. § 2000e — 5(g), which are set out at Appendix D.

Statement of the Case

The petitioners are police officers of the City of Boston who were certified as eligible for promotion to the rank of sergeant on a list established pursuant to the Civil Service laws of the Commonwealth of Massachusetts in 1979 (the "1979 list").[1]

Prior to the certification of the 1979 list, the respondents Massachusetts Association of Afro-American Police, Inc., William Celester and Roy Howard filed a complaint in the District Court alleging *inter alia* that the respondents Boston Police Department and Department of Personnel Administration had engaged in unlawful employment practices and policies limiting employment and promotional opportunities for black police officers in the Boston Police Department in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000 *et seq.*

The parties to the District Court action engaged in settlement negotiations and, on September 16, 1980, a consent

[1] With the exception of Patricia Rehm-Levitan and Arthur W. Morgan, Jr., the petitioners are white males. Arthur W. Morgan, Jr. is black.

decree was approved after hearing and entered as an order of the District Court (the "Consent Decree") (R. p. 91).[2]

The Consent Decree provided that the action be certified as a class action with the class being:

All present and future black sworn officers in the Boston Police Department. The Consent Decree by its terms resolved only those allegations which related to promotions to the rank of sergeant. All other claims were dismissed without prejudice (R. p. 93). The Consent Decree further provided that:

> The consent of the parties shall in no manner constitute findings on the merits of the action, nor shall it be construed as an admission by the defendants of any violation of Title VII, Title VI, 42 U.S.C. §§ 1981, 1983, and 1988 . . .; nor shall it be construed as an admission by the defendants to any of the matters in the complaint filed in this action.

By the terms of the Consent Decree, it was ordered that only twenty-five officers from the 1979 list would be promoted to the position of sergeant (R. p. 94).[3] The Consent Decree required that the respondent Boston Police Department "maintain sufficient vacancies in the rank of sergeant to comply with the goals referred to in paragraph 7 of this Decree" (R. p. 94.)

The Consent Decree contemplated that following promotions from the 1979 list, there would be annual promotions for the life of the Decree, *i.e.* through September 16, 1985, and that the Commissioner of the Boston Police Department

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[2] The reference "R. p." refers to the record appendix before the United States Court of Appeals for the First Circuit.

[3] The petitioners were those officers who were not among the twenty-five officers promoted according to the terms of the Consent Decree (R. p. 129).

"shall" make those appointments in accordance with the goals and timetables set forth in Appendix B of the Consent Decree (R. p. 96, 114).[4]

Following the appointment of twenty-five officers from the 1979 list, no promotional examinations were held for the position of sergeant (R. p. 129).[5] On March 16, 1983, twenty-four officers were promoted as acting or provisional sergeants. Officers so promoted were not selected from a list established under the Civil Service laws, but rather from a list established by the then Commissioner of the Boston Police Department of officers "suitable, qualified and deserving of a promotion to acting sergeant" (R. p. 184-185).[6]

Procedural History

The complaint was filed in the District Court on March 2, 1978. On September 16, 1980, after notice and a hearing, the Consent Decree was approved by the district court. From September 16, 1980 through the date of filing of the petitioners' Motion to Intervene, the only proceedings held in the district court related to the award of attorneys fees and costs (R p. 4-5).

On June 12, 1984, this Court decided *Firefighters' Local Union No. 1784 v. Stotts*, ____ U.S. ____, 104 S.Ct. 2576 (1984). On July 25, 1984, the petitioners filed a Motion to Intervene, asserting that they had been impaired or impeded in protecting their interest in continued eligibility for pro-

[4] Since the decision of the Court of Appeals, the Consent Decree has been extended.

[5] A promotional examination was held on June 1, 1985 after the petitioners' Motion to Intervene had been denied.

[6] In March of 1983, promotions of lieutenants (which were not subject to a consent decree) were made from an eligible list which had been reactivated and exhausted (R. p. 153).

motion by the Consent Decree, particularly in light of the *Stotts* decision, and that they had been prejudiced by the Consent Decree in that the Boston Police Department had appointed acting sergeants to the vacancies which existed rather than having appointed from the 1979 list (R. p. 124-127).

On May 28, 1985, after hearing, the District Court denied the petitioners' Motion to Intervene, holding that the *Stotts* decision was limited to the facts addressed therein and, since there were no layoffs involved with respect to the petitioners' claims, *Stotts* is inapplicable (A.17, A.18).

The petitioners appealed to the Court of Appeals. On December 20, 1985, the Court of Appeals affirmed the order of the District Court, following its decision in *Deveraux v. Geary*, 765 F.2d 268 (1st Cir. 1985), *U.S. App. Pndg.* (A. 8).

Reasons for Granting the Writ

Although *Firefighters' Local Union No. 1784 v. Stotts*, ____ U.S. ____, 104 S.Ct. 2576 (1984), presented the narrow issue of whether the court had the authority to modify a Title VII consent decree to override a seniority system with respect to layoffs, "the manner in which the Court resolved it has potentially sweeping implications for the validity of affirmative action both when undertaken through consent decree and when ordered as a result of litigation." *Leading Cases of the 1983 Term*, 98 Harvard Law Review 267, 267-268.

This petition involves the applicability of *Stotts*, to a settlement agreement relating to promotions of black police officers which was embodied in a consent decree. That Consent Decree includes an express disclaimer of actual discrimination under Title VII. It also includes various race-conscious affirmative action provisions (including promotional goals) which were intended to increase the number of black officers promoted to sergeant in the Boston Police Department.

The primary factor precipitating the filing of the Motion to Intervene was this Court's decision in *Stotts* which raised doubts concerning the validity of the Consent Decree under 42 U.S.C. § 2000e-5(g) since there was no finding that the respondents had "intentionally engaged in" the unlawful employment practices as alleged in the Complaint and since the affirmative action provisions were not limited to actual victims of discrimination. The petitioners also sought to bring to the attention of the District Court that the Consent Decree had not been implemented by the parties to the action according to its terms.

In its decision, the Court of Appeals acknowledged the continuing legal argument relating to affirmative action in the wake of *Stotts* (A. 6). However, the Court of Appeals was reluctant to extend the ruling of *Stotts* to consent decrees governing promotional practices in law enforcement agencies. Rather the Court of Appeals chose to follow its prior decision in *Deveraux*.

In *Deveraux*, the Court of Appeals was also faced with a consent decree relating to promotions. The Court of Appeals listed several reasons in *Deveraux* for holding that *Stotts* did not make the consent decree's affirmative action requirement unlawful, including that 1) the *Deveraux* decree did not conflict with a bona fide seniority plan; 2) that the district court had not ordered changes to the decree over a party's objection but simply enforced the original terms of a decree to which all parties had voluntarily agreed; 3) the *Deveraux* decree provisions, at least arguably, were more like those which *United Steelworkers v. Weber*, 443 U.S. 193 (1979) protected; and 4) that the defendant had admitted prior Title VII violations. *Deveraux v. Geary*, 765 F.2d at 272-273.

The petitioners had attempted to distinguish this Consent Decree from that considered in *Deveraux* upon the fact that the Consent Decree in this case included a disclaimer of Title VII violations and involved third-parties whose eligibility for

promotion was terminated to accommodate the minority. *See, Turner v. Orr,* 759 F.2d 817 (11th Cir. 1985). The Court of Appeals concluded that the fact that this Consent Decree included a disclaimer of Title VII violations was not necessary to uphold the validity of the Consent Decree.

The Consent Decree was designed to create vacancies for members of the class of present and future black police officers who would become eligible during the life of the Consent Decree. To accomplish this purpose, the Decree provided that only twenty-five of those persons certified eligible on the 1979 List would be promoted, thereby terminating the continuing eligibility of those on the 1979 List who were not among the twenty-five officers promoted. Thereafter, the Decree contemplated annual examinations with appointments to be made in accordance with the goals set forth at Appendix B of the Consent Decree. The goals were based upon a percentage of the number of black sergeants to the total number of sergeants in the work force of the Boston Police Department. *See,* 42 U.S.C. § 2000e-2(j).

The Consent Decree effectively created a preference generally for black officers who would subsequently qualify for promotion. That preference would be based merely on membership in a disadvantaged class. As noted in *Stotts,* "mere membership in the disadvantaged class is insufficient to warrant a seniority award, each individual must prove that the discriminatory practice had an impact on him." *Firefighters' Local Union No. 1784 v. Stotts,* ___ U.S. ___, 104 S.Ct. at 2688 *citing Teamsters v. United States,* 431 U.S. 324 at 367-371.

The authority to adopt a consent decree comes only from the statute which the decree was intended to enforce. *Id.,* 104. S.Ct. at 2587, n. 9. Since a consent decree is a court order enforceable through contempt proceedings, it is distinguishable from a voluntary affirmative action plan adopted by a private employer under *United Steelworkers v.*

Weber, 443 U.S. 193 (1979). *See Vanguards of Cleveland v. City of Cleveland*, 753 F.2d 479, 492 (6th Cir. 1985) (dissenting opinion), *Cert. granted sub nom., Local No. 93, International Ass'n. of Firefighters, AFL-CIO v. City of Cleveland*, 106 S.Ct. 59 (October 7, 1985) 42 U.S.C. § 2000e-5(g), on its face, specifically requires that a finding by the court that the respondents either have intentionally engaged in or are intentionally engaging in unlawful employment practices.

If, in fact, this Court intended to change the interpretation of Title VII to require a finding of actual discrimination in any affirmative action case, this Court must so state since the Courts of Appeal have been reluctant to so extend *Stotts*. *See, Vanguards of Cleveland v. City of Cleveland*, 753 F.2d at 486-487; *Diaz v. American Telephone and Telegraph*, 752 F.2d 1356, 1360 n.5 (9th Cir. 1985); *Van Aken v. Young*, 750 F.2d 43, 45 (6th Cir. 1984); *Wygant v. Jackson Board of Education*, 746 F.2d 1152, 1157-1158 (6th Cir. 1984), *Cert. granted*, ____ U.S. ____, 105 S.Ct. 2015 (April 15, 1985); *Kromnick v. School District of Philadelphia*, 739 F.2d 894, 911 (3d Cir. 1984), *Cert. denied*, 105 S.Ct. 782 (1985); *cf. EEOC v. Local 638*, 753 F.2d 1172, 1186 (2d Cir.) *Cert. granted sub nom., Local 28 of Sheet Metal Workers' International Ass'n. v. EEOC*, ____ U.S. ____, 106 S.Ct. 58 (October 7, 1985); *Grann v. City of Madison*, 738 F.2d 786, 795 n.5 (7th Cir.), *Cert. denied*, ____ U.S. ____, 105 S.Ct. 296 (1984).

The remedy which a consent decree may provide cannot exceed the authority conferred by statute. *Firefighters Local Union No. 1784 v. Stotts*, 104 S.Ct. at 2587. The policy of Title VII is to provide "make-whole relief only to those who have been actual victims of illegal discrimination. *Id.*

Thus, it is questionable whether the District Court exceeded its authority under 42 U.S.C. § 2000e-5(g) by approving a decree which embodied percentage goals for promotions of black officers based merely on their membership in the class of all present and future black officers of the Boston Police Department while disclaiming past discriminatory promotional practices.

The petitioners have also asserted that they are the "third parties" who were injured by the Consent Decree. *See Turner v. Orr,* 759 F.2d 817 (11th Cir. 1985). The Consent Decree was entered after the petitioners were certified as eligible for promotion. Their continuing eligibility for promotion was "bargained away" at the time the Decree was entered. With the exception of appointing the twenty-five officers from the 1979 List, the Decree was not implemented for almost five years.

In 1983, there were at least twenty-four vacancies. Those vacancies were filled with "acting sergeants" who were not selected in accordance with the Consent Decree or with the Civil Service laws of the Commonwealth.

Although it has been held that relief authorized to be given actual victims under Title VII does not include "bumping" employees previously occupying jobs, see *Firefighters' Local No. 1784 v. Stotts,* 104 S.Ct. at 2588, n. 11, the petition raises the question whether vacancies can be maintained over an extended period of time for the benefit of minority officers. A remedial plan embodied in a consent decree is subject to continuing oversight by the court to assure that it will work the least possible harm to others competing for the benefits. *Regents of University of California v. Baake,* 438 U.S. 301, 302 (1978).

Conclusion

"In the end, the most disturbing feature of the *Stotts* opinion is the legal uncertainty that it leaves in its wake." 98 Harvard Law Review, at 277. The uncertainty was acknowledged by the Court of Appeals but left to this Court for resolution. In light of the uncertainty created by *Stotts,* this petition should be granted to resolve those uncertainties as they relate to affirmative action consent decrees relating

to promotions and to the rights of third parties who have been adversely affected by such consent decrees.

Respectfully submitted,

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Appendix A

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 85-1453

MASSACHUSETTS ASSOCIATION
OF AFRO-AMERICAN POLICE, INC.,
ET AL.,
Plaintiffs, Appellees,

v.

THE BOSTON POLICE DEPARTMENT, ET AL.,
Defendants, Appellees;

BOSTON POLICE DETECTIVES
BENEVOLENT SOCIETY,
Appellant.

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF MASSACHUSETTS,
(Hon. John J. McNaught, U.S. District Judge)

Before
Coffin and Breyer, *Circuit Judges,*
and Wyzanski, *Senior District Judge**

Regina L. Quinlan for appellants.
Jonathan M. Albano with whom John F. Adkins,
Bingham, Dana & Gould, and Barbara Arnwine
were on brief for appellee Massachusetts Association of

Afro-American Police, Inc.

Leonard G. Learner, Assistant Attorney General, with whom Francis X. Bellotti, Attorney General, was on brief for appellee Department of Personnel Administration.

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*Of District of Massachusetts, sitting by designation.

December 20, 1985

BREYER, Circuit Judge. A group of Boston police officers appeal the district court's denial of their motion to intervene in *Massachusetts Association of Afro-American Police, Inc. (MAAAP) v. The Boston Police Department,* Civ. Action No. 78-529McN (filed March 2, 1978), a case in which black police officers attacked the Boston Police Department's promotion practices as illegally discriminatory. *See* Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) (as amended). The appellants sought intervention in order to attack the *MAAAP* consent decree, entered in 1979, which contained various affirmative action provisions designed to increase the number of black officers promoted to sergeant. Appellants' motion to intervene rests upon their claim that the law has changed significantly since the decree was entered. They believe that the recent Supreme Court case of *Firefighters' Local Union No. 1784 v. Stotts,* 104 S.Ct. 2576 (1984), now makes clear that Title VII court decrees that require an employer to favor minority over nonminority employees are unlawful, unless the favored employees themselves had been previous, actual victims of illegal discrimination.

We recently considered, and rejected, this same claim in a similar case with a similar decree imposing similar affirmative action promotion requirements upon the Metropolitan

District Commission (MDC) — another Boston area law enforcement agency. *Deveraux v. Geary*, 765 F.2d 268 (1st Cir. 1985). The dispositive legal question before us now is whether this case differs significantly from *Deveraux*. The only distinguishing feature to which appellants point is the fact that the consent decree in *Deveraux* contained a stipulation that the MDC had previously violated Title VII, while here the Boston Police Department made no such concession. We find that this distinction is not determinative.

We listed several reasons in *Deveraux* for believing that *Stotts* did not make the decree's affirmative action requirement unlawful: 1) The *Stotts* decree directly conflicted with "a bona fide seniority . . . system," 42 U.S.C. § 2000(e)-2(h); the *Deveraux* decree did not. 2) The *Stotts* district court had ordered changes to the decree over a party's objection; the *Deveraux* district court simply enforced the original terms of a decree to which all parties had voluntarily agreed. 3) The *Stotts* decree changes (being involuntary) fell outside the scope of *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979) (holding that Title VII does not forbid private employers from voluntarily entering into affirmative action plans to eliminate manifest racial imbalance); the *Deveraux* decree provisions, at least arguably, were more like those which *Weber* protected. 4) As appellants correctly point out, we also said that in *Stotts* the defendant had not admitted prior Title VII violations, while in *Deveraux* the MDC had. Our rereading of *Deveraux*, however, convinces us that this final distinction (which we there called "a further distinction,") is not necessary to the result.

For one thing, the first three distinctions are strong ones. For another thing, the cases from other circuits which we relied upon in reaching the *Deveraux* result, for the most part do not rely upon the fourth distinction. *See Vanguards of Cleveland v. City of Cleveland*, 753 F.2d 479, 486-87 (6th Cir. 1985), *cert. granted sub nom. Local No. 93, International*

Ass'n. of Firefighters, AFL-CIO v. City of Cleveland, 106 S.Ct. 59 (October 7, 1985); *Diaz v. American Telephone and Telegraph,* 752 F.2d 1356, 1360 n.5 (9th Cir. 1985); *Van Aken v. Young,* 750 F.2d 43, 45 (6th Cir. 1984); *Wygant v. Jackson Board of Education,* 746 F.2d 1152, 1157-58 (6th Cir. 1984), *cert. granted,* 105 S.Ct. 2015 (April 15, 1985); *Kromnick v. School District of Philadelphia,* 739 F.2d 894, 911 (3d Cir. 1984), *cert. denied,* 105 S.Ct. 782 (1985); *cf. EEOC v. Local 638,* 753 F.2d 1172, 1186 (2d Cir.) *cert. granted sub nom. Local 28 of Sheet Metal Workers' International Ass'n. v. EEOC,* 106 S.Ct. 58 (October 7, 1985); *Grann v. City of Madison,* 738 F.2d 786, 795 n.5 (7th Cir.), *cert. denied,* 105 S.Ct. 296 (1984).

Finally, here and in *Deveraux,* the underlying cases involved a complaint of Title VII violation; a voluntary settlement of the complaint; and a consent decree that (arguably) favors minority employees not themselves actual victims of discrimination. While we are aware of the continuing legal argument about 'affirmative action,' *Wygant v. Jackson Board of Education, supra, (cert. granted); Vanguards of Cleveland v. City of Cleveland, supra (cert. granted); EEOC v. Local 28, supra, (cert. granted),* we are not aware of any convincing legal theory that would resolve that argument on the basis of whether the parties had bothered to negotiate an 'admission' as part of their consensual settlement of the suit. Thus, we find *Deveraux* dispositive of the present appeal.

Appellants have asked us to wait to decide this appeal until the Supreme Court has decided *Wygant,* supra. We decline to do so. A delay to await clarification of the law could be lengthy, for *Wygant* may not be dispositive of this, rather different, affirmative action provision. And, the Court has before it other requests to review affirmative action in cases not yet briefed or argued. At the same time, delay could inhibit efforts by the Boston Police Department to implement a non-discriminatory promotion examination, developed as a

result of other, related portions of the decree; it would make more difficult the Department's administrative tasks; and it could injure those who might be promoted under any lawful employment system. Under these circumstances, we believe it appropriate simply to apply what is existing law in this circuit.

The judgment of the district court is Affirmed.

Appendix B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MASSACHUSETTS ASSOCIATION
OF AFRO-AMERICAN POLICE,
INC., et al,
Plaintiffs,

v.

CIVIL ACTION
NO. 78-529-Mc

THE BOSTON POLICE
DEPARTMENT, et al,
Defendants.

MEMORANDUM AND ORDER

May 28, 1985

McNAUGHT, D.J.

The applicants for intervention have filed a motion, Document 55, pursuant to Fed. R. Civ. P. 24 (a) for leave to intervene as defendants in this action in order to move that the consent decree between the existing parties approved by this Court on September 16, 1980 be vacated and that the applicants for intervention be made whole by an order that they be promoted to the permanent position of sergeant in the Boston Police Department. Both the plaintiffs, the Massachusetts Association of Afro-American Police, Inc., et al., and the defendants, the Boston Police Department, et al., have opposed the motion to intervene and have filed a motion, Document 68, to continue the consent decree for five years

until September 16, 1990 and to permit the parties to modify the goals, timetables, factual background and statistics in the decree in order to reflect the demographic changes in the Boston Police Department during the past five years. The Boston Police Patrolmen's Association and the Boston Police Detectives Benevolent Society have also filed motions, Document 75 and Document 80 respectively, pursuant to Fed. R. Civ. P. 24(a), for leave to intervene for the purpose of objection to the extension of the existing consent decree. Finally, both the parties oppose the motions of the Boston Police Patrolmen's Association and the Boston Police Detectives Benevolent Soceity to intervene.

On March 2, 1978, the plaintiffs, the Massachusetts Association of Afro-American Police, Inc. ("MAAAP"), filed the complaint in this action alleging that the defendants, the Boston Police Department ("Department") et al., were engaged in employment discrimination based on race and color in violation of, *inter alia,* Title VII of the Civil Rights Act of 1964, 42 U.S.C. @ 2000 *et seq.* After more than two years of extensive negotiations, the parties reached agreement on a proposed consent decree. Notice of the proposed decree was provided to the plaintiffs, as well as to four white Boston Police Department officers who had moved to intervene to protect their interest in being promoted to the position of sergeant. Three of those officers are also presently applicants for intervention. On July 9, 1980, this Court denied their first motion to intervene; the denial was not appealed. On that same date, the parties entered into the consent decree at issue here, which was approved by this Court on September 16, 1980.

The consent decree provided for the establishment of validated promotional procedures, the implementation of the Department's pre-existing affirmative action plan and the establishment of goals and timetables for the promotion of blacks to the position of sergeant. Furthermore, the consent

decree provided that the Department would promote no more than twenty-five officers from the then-existing eligible list as established in March of 1979 to permanent positions of sergeant. As to promotional tests, the decree stated that the Department should not use tests for the purpose of selecting police officers for promotion unless such tests are validated in accordance with the "Uniform Guidelines on Employee Selection Procedures," 29 C.F.R. @ 1607.1 *et seq.*, or otherwise shown to have no discriminatory impact. In addition, the decree required the Department to provide all eligible applicants opportunity for training before promotional tests, to ensure minority applicants equal access to such training, and to post notice of forthcoming promotional exams at least sixty days in advance. Consent Decree at 4-6. Finally, the consent decree was to terminate after five years from its entry unless any party moved for its continuation on the ground that its objectives had not been fully achieved. Consent Decree at 7.

As a result of the recent Supreme Court decision of *Firefighters Local Union No. 1784 v. Stotts*, ____ U.S. ____, 104 S.Ct. 2576, 81 L. Ed. 2d 483, 52 U.S.L.W. 4767 (June 12, 1984), the applicants for intervention ("applicants") moved to intervene on July 25, 1984 in order to vacate the consent decree. It is their contention that *Stotts* "held that the remedial authority of the trial court under Title VII is limited to actual victims of defendants (sic) unlawful discrimination, *Id.* at 2588," and that therefore "the Court lacked subject matter jurisdiction under that Title to adopt the Consent Decree absent a finding that any of the plaintiffs had been a victim of defendants (sic) discrimination." (Applicants' Memorandum in Support of Motion to Intervene at 8) Such a reading of *Stotts* is far too broad. The issue in *Stotts* was much narrower: whether a court may enjoin a city from following its seniority system in determining who must be laid off as a result of a budgetary shortfall where a consent

decree between the city and the firefighters addressed only hiring and promotional practices. The Supreme Court concluded that such an injunction could not be justified, either as an effort to enforce the consent decree or as a valid modification. *Stotts*, ____ U.S. ____, 104 S.Ct. at 2586. In so holding, the Court reaffirmed its ruling in *Teamsters v. United States*, 421 U.S. 324 (1977), that a court can award competitive seniority only when the beneficiary of the award has actually been a victim of illegal discrimination. *Id.*, at ____ U.S., ____, 104 S.Ct. at 2589. The holding of *Stotts* cannot be extended beyond its rather narrow fact pattern.

As Judge Mazzone noted in the recent decision *Deveraux v. Geary*, 596 F. Supp. 1481 (D. Mass. 1984), in analyzing the impact of *Stotts* on Title VII law:

> Had the Court meant to rewrite Title VII law to mean that all affirmative action programs are improper absent a finding of actual past discrimination, it would have said so here. *See Culbreath*, 630 F.2d at 23, *citing United States Steelworkers v. Weber*, 443 U.S. 193, 99 S.Ct. 2721, 61 L.Ed. 2d 480 (1979); *University of California v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed. 2d 750 (1978); *United States v. City of Miami*, 614 F.2d 1322 (5th Cir. 1980); *Boston Chapter NAACP, Inc. v. Beecher*, 504 F.2d 1017 (1st Cir. 1974), *cert. denied*, 421 U.S. 910, 95 S.Ct. 1561, 43 L.Ed. 2d 775 (1975); *Associated General Contractors of Massachusetts, Inc., v. Altshuler*, 490 F.2d 9 (1st Cir. 1973), *cert. denied*, 416 U.S. 957, 94 S.Ct. 1971, 40 L.Ed. 2d 307 (1974). The clear implication of the above language (that "it is reasonable to believe that the "remedy", which it was the purpose of the decree to provide, would not exceed the bounds of the remedies that are appropriate under Title VII, at least absent some express provision to that effect," *Stotts*, ____ U.S. ____, 104 S.Ct. at 2586) is that the actual remedy that was provided by the decree was valid and did not exceed the bounds of Title VII, although the subsequent displacement of white employees was invalid.

Deveraux v. Geary, 596 F. Supp. at 1486. That cogent analysis of *Stotts* rightly limits its application to the set of facts addressed therein.[7] In the present case, since there is no issue of any layoffs made in violation of a bona fide seniority system, *Stotts* is inapplicable.

Although there are no layoffs in the case at bar, the applicants for intervention attempt to fit into the *Stotts'* fact pattern by characterizing themselves as having a strong interest in seniority rights and upward job mobility. They, like all other police officers, hope to be promoted. But hopes are often elusive and the hope of being promoted is merely that; it is not a seniority right. The consent decree at issue here was designed to remove all vestiges of discrimination from the process of promoting police officers; as such it does not affect seniority rights of officers who hope to be promoted in the future.

As there is therefore no basis for intervention, it is unnecessary to discuss whether the motion for intervention would meet the test for timeliness as articulated in *Stallworth v. Monsanto*, 558 F.2d 257 (5th Cir. 1977) and adopted by the First Circuit in *Culbreath v. Dukakis*, 630 F.2d 15 (1st Cir. 1980). Accordingly, the motion of the applicants for intervention for leave to intervene as defendants in this action is denied.

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[7] *See also Vanguards of Cleveland v. City of Cleveland*, No. 83-3091 (6th Cir. January 23, 1985) (*Stotts* has no effect on voluntary affirmative action plans embodied in consent decrees.); *Equal Employment Opportunity Commission v. Local 28, No. 1106* (2nd Cir. January 16, 1985) (distinguishing case from *Stotts* based on fact that *Stotts*" discussion of @ 706(g) related only to "make whole" relief and not to prospective relief such as in the affirmative action plan at issue there); *Aken v. Young*, No. 82-1570 (6th Cir. December 13, 1984) and *Wygant v. Jackson Board of Education*, 746 F.2d 1152 (6th Cir. 1984) (*Stotts* did not overrule *Weber's* refusal to condemn voluntary, race-conscious affirmative action plans.); *Britton v. South Bend Community Corp.*, 593 F.Supp. 1223, 1230-31, n.4 (N.D. Ind. 1984) (*Stotts* is inapplicable to voluntary affirmative action programs.)

Finally, both the plaintiffs and the defendants have filed a motion pursuant to P13 of the consent decree that the Court modify and continue the decree. As grounds therefor, both parties state that P13 of the consent decree entered in this case on September 16, 1980 provides in pertinent part that:

> The Decree shall terminate after 5 years from its entry unless any party has moved for its continuation on the ground that the objectives of the Decree have not been fully achieved. The Court will thereupon determine whether or not the Decree will be dissolved.

It is premature, four months before the consent decree is currently scheduled to be terminated, for the Court to determine whether or not the objectives of the decree have been fully achieved. The Court therefore declines at the present time to grant or deny the motion of the parties. At a later, more appropriate time, the motions may be renewed.

Appendix C

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 85-1453

MASSACHUSETTS ASSOCIATION
OF AFRO-AMERICAN POLICE, INC.,
ET AL.,
Plaintiffs, Appellees,

v.

THE BOSTON POLICE DEPARTMENT, ET AL.,
Defendants, Appellees;

BOSTON POLICE DETECTIVES
BENEVOLENT SOCIETY,
Appellant.

JUDGMENT

Entered: December 20, 1985

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, it is now ordered adjudged and decreed as follows: The order of the district court is affirmed.

By the Court:
Francis P. Scigliano
Clerk.

Appendix D

42 U.S.C. § 2000e-2(j)

(j) Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin or such individual or group on account of an imbalance which may exist with respect to the total number or percentage or persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any communtiy, State, section, or other area, or in the available work force in any community, State, section, or other area.

Pub. L. 88-352, Title VII, § 703, July 2, 1964, 78 Stat. 255; Pub.L. 92-261, § 8(a), (b), Mar. 24, 1972, 86 Stat. 109.

42 U.S.C. § 2000e-5(g)

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the

court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.